From:	Nelson, Berk
To:	Nathan.VASQUEZ@mcda.us; Rochon, Emily; john.s.mcvay@multco.us; abbey.stamp@multco.us; adam.renon@multco.us
Subject:	Fwd: Legal guidance regarding a proposed jail alternative for individuals with a dual-diagnosis
Date:	Tuesday, September 11, 2018 6:01:36 PM

All,

These are the legal barriers we are facing. Also, I spoke with the Safety Justice Center rep. She's going to forward me info on other cites in the county who are doing this. Stay tuned.

Sent from my iPhone

Begin forwarded message:

> **From:** "Barraclough, Andrea" <Andrea.Barraclough@portlandoregon.gov>
> **Date:** September 11, 2018 at 5:18:21 PM PDT
> **To:** "Nelson, Berk" <Berk.Nelson@portlandoregon.gov>
> **Cc:** "Reeve, Tracy" <Tracy.Reeve@portlandoregon.gov>, "Taylor, Robert" <Robert.Taylor@portlandoregon.gov>, "Law, Linda" <Linda.Law@portlandoregon.gov>
> **Subject: Legal guidance regarding a proposed jail alternative for individuals with a dual-diagnosis**
>
> Greetings Berk,
>
> I was asked to perform legal research regarding the possibility of the City establishing a secure alternative to jail for those persons who are arrested on a non-violent criminal offense while intoxicated and/or in mental health crisis. The short answer is that I believe the City could create such a space, but the Oregon Health Authority (State) would have to be involved in approving it. Further, the maximum time limit for keeping a person at this facility against their will would be five (5) days for a mentally ill person and two (2) days for an intoxicated person. However, there are many complexities to creating a facility that involve criminal law, and we would likely want to discuss this idea and get buy-in from the DA's Office.
>
> The following is the relevant law from which you can draw this conclusion:
>
> Typically, a police officer has the authority to become involved in community caretaking of intoxicated or mentally-ill persons. The mechanisms of involvement are different depending on whether the officer believes the person is intoxicated or suffering a mental-health crisis at the time of contact. (As we discussed, officers generally will not have prior knowledge or a dual-diagnosis or cannot make a medical finding of a likely dual-diagnosis. Accordingly, officers will generally rely on their observation of the likely primary trigger for the behavior).
>
> ***A. Civil Commitments of the Mentally Ill***

If the officer believes the person is a danger to themselves or others, they can initiate the civil commitment process by detaining the individual and transporting them to a medical provider. *See* ORS 426.228(1) ("A peace officer may take into custody a person who the officer has probable cause to believe is dangerous to self or to any other person and is in need of immediate care, custody or treatment for mental illness. As directed by the community mental health program director, a peace officer shall remove a person taken into custody under this section to the nearest hospital or **nonhospital facility approved by the Oregon Health Authority**."). But, given the bolded language, officers may also transport the mentally ill person to a non-hospital facility if that facility is approved by the Oregon Heath Authority. Accordingly, mentally ill persons can be taken by police upon contact to somewhere other than a hospital or jail, if there is a licensed mental-healthcare provider approve by OHA at the facility.

(However, that provider would have to be on board with the mission of the institution established, such that, unlike other busy and overcrowded hospitals, they will be unlikely to turn someone away or release them quickly. This is because, if the provider finds them not a danger to themselves or others, the officer must transport the individual back to where they were arrested and let them go, or they must be let go to find their own way home if they so choose. ORS 426.228(4)).

Once at the non-hospital facility, if the provider does agree the person is a danger to themselves or others, they have the ability to hold '[d]etain the person and cause the person to be admitted or, if the person is already admitted, cause the person to be retained in a hospital where the licensed independent practitioner has admitting privileges or is on staff, ORS 426.232(1)(a), **or approved them for emergency care or treatment at a nonhospital facility approved by the authority**. ORS 426.232(1)(b). In other words, the licensed health-care provider could civilly commit the individual to the same non-hospital facility to which they were taken if that center is approved by OHA. The time limit for holding a person at the non-hospital facility is "for as long as is feasible given the needs of the person for mental or physical health or safety, [but] under no circumstances may the person be held for longer than five judicial days." ORS 426.232(2). Thus, this new institution could not hold persons longer than 5 days where there is an attempt to civilly commit, which may be enough time to act as a jail alternative, as the person should be evaluated by a judge for competency on their criminal charges by that time (and if truly mentally unstable and unable to assist in their own defense, be sent to the state psychiatric hospital).

Accordingly, an individual primarily observed by officers to be presenting with a mental illness at the time of arrest could go to a non-hospital treatment facility approved by OHA and detained there for five days while other civil commitment and/or criminal competency evaluations are occurring.

B. Temporary Holds of the Intoxicated

If an officer suspects that a person is intoxicated in a public place, they *may* take the individual to a sobering facility or treatment facility, but *shall* where the person is so intoxicated as to be incapacitated (unable to make a rational decision or accept assistance) or where they present a danger to themselves or others. ORS 430.399(1).

"Treatment facility" is defined as "outpatient facilities, inpatient facilities and other facilities the authority determines suitable and that provide services that meet minimum standards established under ORS 430.357 (Minimum standards)", any of which may provide diagnosis and evaluation, medical care, detoxification, social services or rehabilitation for alcoholics or drug-dependent persons and which operate in the form of a general hospital, a state hospital, a foster home, a hostel, a clinic **or other suitable form approved by the authority.** 430.306(9). Accordingly, any treatment facility would again have to be approved by the OHA.

But, for a treatment facility used for sobriety, two-days is the time limit for involuntary detention. Thereafter, a person is only obliged to stay at the treatment facility is they volunteer to do so. ORS 430.399(2). Notably, the time limit for a sobering facility is only 24-hours before release is required. ORS 430.399(3).

A "sobering facility" is defined as a facility that: 1) provides a clean and supervised environment to overcome acute intoxication; 2) is affiliated with a drug and alcohol treatment program or provider to which a long term referral can be made; 3) has written policies that comport with best practices for ensuring the safety of intoxicated individuals, employees, and volunteers; and 4) is registered with OHA. Thus, the City's proposed institution would be able to keep persons longer as a treatment facility than a sobering facility and could do so by meeting the definitions of the former.

However, sobering facilities may not be an option when the person is arrested for a criminal offense. In that case, "[a] n intoxicated person or person under the influence of controlled substances, when taken into custody by the police officer for a criminal offense, shall immediately be taken to the nearest appropriate treatment facility when the condition of the person requires emergency medical treatment." ORS 430.399(5). In other words, if there is an arrest, the alternative to jail must be a treatment facility and not a sobering facility.

C. Dual-Diagnosis

As noted, officers likely will not be able to tell definitively without the benefit of suspect medical history whether what they are observing is the result of both addiction and mental illness. Thus, they must rely on their initial judgment of the situation to decide whether the person will be taken to a non-hospital or hospital, or a treatment facility of sobering facility.

Generally, it takes 24-48 hours for an intoxicated person to become sober enough to ascertain whether there is an underlying mental illness unrelated to or not exacerbated by the acute intoxication. Thus, to meet statutory requirements, the proposed facility

would have to have both drug treatment and mental health treatment providers, and any policies created to manage same would have to delineate a 48-maximum hold for acute intoxication, a 5-day maximum hold for those in mental health crisis, and the ability to convert a 48-hour hold to a 5-day hold if sobriety reveals an underlying dual-diagnosis. The facility, with its dual purposes, would also have to be approved by OHA for both treatment types.

D. Extending Detention

Ultimately, a judge is in the best and sometimes only position to determine whether someone is so mentally ill or intoxicated that they should be civilly committed, sent to the state psychiatric hospital as incompetent to mount a defense, or not a danger to themselves or others and subject to release. Ideally, a judge should be able to make this determination at the 48- hour bail/PC hearing post-arrest or at the 36-96-hour arraignment. However, the proposed institution and its providers would need to be ready for the possibility of a judge not being able to determine competency quickly (e.g. borderline test results or conflicting findings among experts). Accordingly, I would suggest that, where a dual-diagnosis presents after sobriety (or the primary indicator was always mental illness), the provider begin civil proceedings wherever a judge cannot easily determine mental capacity at or before the 36-96 hour arraignment. In other words, if the judge does not transfer them to the state psychiatric facility within three days of arrest, the provider should start their portion of the civil commitment proceedings where appropriate (i.e. the person still is a danger to themselves or others or in active mental health crisis) as soon as possible to extend the 5-day window for required release

All that said, if the person is not a danger to themselves or others once the intoxication wears off and 48 hours has passed, or once the 5 days has passed since their mental health crisis during arrest, there is no legal authority to force them to stay at the facility. If PPB or the MCDA believes the person belongs in detention based on their crimes, the only option is to take them to jail.

E. Legal Authority of Officers Not to Take a Person to Jail if Arrested

Per ORS 133.310(1), offices *may* arrest where they have probable cause to believe a person has committed a crime. "May" indicates a level of discretion, such that officers can choose not to arrest and instead send someone to a treatment for mental health treatment or sobriety. (Note, under ORS 133.310(3), there are certain crimes an officer *shall* arrest for, and in those circumstances, and officer may not be able to use the proposed jail alternative even if the person is intoxicated, in mental health crisis, or dually diagnosed.)

As for where a person must be taken if arrested, ORS Chapter 169 discusses three options: 1) local correctional facility; 2) lock-up; and 3) temporary holding. A facility is considered a lock-up facility if the individual will be detained there for no longer than

36 hours. If they will be detained longer, it is considered a local correctional facility and must meet the requirements of a local correctional facility. See ORS 169.077, 169.005. Since the City's proposed institution may wish to hold people up to 5 days, the facility should consider itself a local correctional facility under169.005(4) and seek to meet those standards.

That said, per ORS 169.030, a county and city is allowed to have more than one local correctional facility. While typically, only a county sheriff has authority over prisoners in the county local correctional facility per ORS 169.320, the statutes are silent over who would have authority over a prisoner in a city facility. Thus, the City likely could add this secure treatment facility without stepping on the county's toes jurisdictionally.

Of course, this does not account for the fact that ORS 135.245 states "[e] as provided in ORS 135.240 (Releasable offenses), a person in custody has the right to immediate security release or to be taken before a magistrate without undue delay. So, if people are brought to this facility on the auspices that it is a jail alternative and they are still facing a criminal charge, arguable, they are still entitled to make bail. And if they can pay, they may be eligible for release, unless there are other civil commitment proceedings being initiated. For this reason, there is a potential for this proposed institution to create work for DA's making bail arguments, and the Mayor may wish to consult with the DA about the ramifications on bail arguments. Perhaps ORS135.260's conditional release could be the answer to keeping persons detained at the facility despite entitlement to bail, but again, that is more of a criminal law question for the DA.

I hope this provides some legal guidance that will help you determine the feasibility of such a proposed project. Please let me know if you have any other questions.

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